IN THE COURT OF APPEALS OF THE STATE OF IDAHO

Docket No. 34864

STATE OF IDAHO,	)	**2008 Unpublished Opinion No. 690**
	)	
Plaintiff-Respondent,	)	**Filed: November 3, 2008**
	)	
v.	)	**Stephen W. Kenyon, Clerk**
	)	
RODNEY DEAN PRECHT,	)	**THIS IS AN UNPUBLISHED**
	)	**OPINION AND SHALL NOT**
Defendant-Appellant.	)	**BE CITED AS AUTHORITY**
	)	

Appeal from the District Court of the Third Judicial District, State of Idaho, Canyon County. Hon. Juneal C. Kerrick, District Judge.

Judgment of conviction for misdemeanor driving under the influence, affirmed.

Wiebe & Fouser, Canyon County Public Defender; Thomas A. Sullivan, Deputy Public Defender, Caldwell, for appellant. Thomas A. Sullivan argued.

Hon. Lawrence G. Wasden, Attorney General; Ann Wilkinson, Deputy Attorney General, Boise, for respondent. Ann Wilkinson argued.

LANSING, Judge

Rodney Dean Precht appeals from the district court's appellate decision affirming his judgment of conviction for misdemeanor driving under the influence. Precht claims evidence was improperly admitted at trial and that the prosecutor made improper statements during closing argument. Although we conclude that prosecutorial misconduct occurred in the closing argument, we deem the errors harmless and therefore affirm the judgment of conviction.

I.
BACKGROUND

At approximately 9:30 p.m. on a June evening, Precht was driving on a road near Caldwell when he pulled to the side of the road, apparently to send a text message on his cell phone. An off-duty officer driving his personal vehicle drove by and, upon seeing Precht sitting in his car with his head down, became suspicious that Precht was a drunk driver who had passed out. The officer then saw that Precht was driving away. The officer telephoned for backup and

followed Precht until Precht stopped his car. Precht appeared to the officer to be intoxicated, but he refused requests to take any field sobriety tests. After an on-duty officer arrived, Precht was arrested and placed in the patrol car, where he began insulting the arresting officer with a range of vulgarities. Precht's insults, which ranged from the mildly offensive to explicitly vulgar, were captured on videotape.

After being charged with misdemeanor driving under the influence (second offense), Idaho Code section 18-8004, Precht filed a motion in limine to prevent introduction of the videotape at trial. He argued that this evidence of his vulgarity was irrelevant or, alternatively, that its relevance was substantially outweighed by the danger of unfair prejudice. The magistrate denied the motion, and the videotape was played to the jury at trial.

On appeal, Precht challenges the denial of his motion in limine. He also contends that the prosecutor made several statements during closing argument at Precht's trial that amounted to prosecutorial misconduct and necessitate a new trial.

II.

DISCUSSION

A. Evidence of Appellant's Alleged Vulgar Statements

Precht asserts the vulgar comments he made to the arresting officer were irrelevant or, even if marginally relevant, should have been excluded under Idaho Rule of Evidence 403[1] because they carried a risk of unfair prejudice that substantially outweighed any probative value. Questions concerning the relevance of evidence are matters of law that we review de novo, but other issues on the admissibility of evidence are reviewed for an abuse of discretion. *State v. MacDonald*, 131 Idaho 367, 369, 956 P.2d 1314, 1316 (Ct. App. 1998). Evidence is relevant if it has "any tendency to make the existence of any fact that is of consequence to the determination of the action more or less probable than it would be without the evidence." I.R.E. 401. Even relevant and otherwise admissible evidence may be excluded if the trial court concludes, in the exercise of its discretion, that the evidence's probative value is substantially outweighed by the

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[1] Rule 403 states:

> Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.

danger of unfair prejudice. I.R.E. 403; *State v. Winn*, 121 Idaho 850, 853, 828 P.2d 879, 882 (1992); *State v. Enno*, 119 Idaho 392, 405-06, 807 P.2d 610, 623-24 (1991); *State v. Hawkins*, 131 Idaho 396, 402, 958 P.2d 22, 28 (Ct. App. 1998).

We find no error in the magistrate's determination that Precht's insulting statements were relevant to demonstrate his level of intoxication. An officer testified at Precht's trial that slurred speech and sudden belligerence or use of obscenity are indicators that an individual is under the influence of alcohol. Even without that testimony, it would have been within the common knowledge of jurors that intoxication can diminish inhibitions and magnify this sort of brutish behavior. Precht's diatribe was thus probative to show he was under the influence of alcohol.

We likewise find no abuse of discretion in the district court's application of the I.R.E. 403 balancing test--finding that the probative value of this evidence was not substantially outweighed by a danger of unfair prejudice. We considered a similar question in *State v. Floyd*, 125 Idaho 651, 873 P.2d 905 (Ct. App. 1994), where the defendant challenged the admission of an audiotape recording of vulgar statements he made in describing his sexual encounter with a woman whom he was eventually convicted of having kidnapped and raped. We there stated:

> Rule 403 does not offer protection against evidence that is merely prejudicial in the sense of being detrimental to the party's case. The rule protects against evidence that is unfairly prejudicial, that is, if it tends to suggest decision on an improper basis. *Wade v. Haynes*, 663 F.2d 778, 783 (8th Cir. 1981). The fact that Floyd's choice of words in his statement were crude, vulgar and potentially offensive to a jury is not in and of itself sufficient reason to exclude Floyd's uncoerced statement to law enforcement investigators. "Certainly that evidence was prejudicial to the defendant, however, almost all evidence in a criminal trial is demonstrably admitted to prove the case of the state, and thus results in prejudice to a defendant." *State v. Leavitt*, 116 Idaho 285, 290, 775 P.2d 599, 604 (1989). As to Floyd's argument that the state could have elicited the same information through [a detective's] testimony, we conclude that the state is not obligated to present evidence which has a lesser impact.

Id. at 654, 873 P.2d at 908. Although some of Precht's statements were crude and offensive, the very belligerence and lack of self-control that they expressed had probative value, and the magistrate did not abuse its discretion in admitting them.

B. Prosecutorial Misconduct in Closing Argument

Precht asserts that a number of statements made by the prosecutor during closing argument amount to prosecutorial misconduct. Objection to some of these was made at trial, while others were not met with an objection. This Court does not ordinarily address an issue that

was not preserved for appeal through an objection in the trial court. *State v. Rozajewski*, 130 Idaho 644, 645, 945 P.2d 1390, 1391 (Ct. App. 1997). We may consider error in a criminal case, however, even though no objection was made at trial, if it rises to the level of fundamental error. Fundamental error is error that goes to the foundation or basis of a defendant's rights or goes to the foundation of the case or takes from the defendant a right that was essential to his or her defense and which no court could or ought to permit the defendant to waive. *State v. Babb*, 125 Idaho 934, 940, 877 P.2d 905, 911 (1994); *State v. Bingham*, 116 Idaho 415, 423, 776 P.2d 424, 432 (1989); *State v. Nevarez*, 142 Idaho 616, 623, 130 P.3d 1154, 1161 (Ct. App. 2005). Prosecutorial misconduct during closing argument, to which no contemporaneous objection was made, rises to the level of fundamental error when it is calculated to inflame the minds of jurors and arouse prejudice or passion against the defendant, or is so inflammatory that the jurors may be influenced to determine guilt on factors outside the evidence. *State v. Sheahan*, 139 Idaho 267, 280, 77 P.3d 956, 969 (2003). *See also State v. Timmons*, 145 Idaho 279, 287, 178 P.3d 644, 652 (Ct. App. 2007) (citations omitted). Even when prosecutorial misconduct constitutes fundamental error, however, the conviction will not be reversed if that error is harmless. Prosecutorial misconduct constitutes harmless error if the appellate court can conclude, beyond a reasonable doubt, that the result of the trial would not have been different absent the misconduct. *Id.*

Precht first argues that several of the prosecutor's comments were designed to shift the burden of proof from the State and encourage the jurors to require Precht to prove his innocence. There are few principles more fundamental in criminal law than that which requires the State to carry the burden of proving a criminal defendant's guilt beyond a reasonable doubt, a principle that is grounded in the Due Process Clause of the Fourteenth Amendment. *In re Winship*, 397 U.S. 358, 361-64 (1970). Therefore, Precht's assertion that the prosecutor's comments were aimed at shifting this burden of proof raises an issue of fundamental error reviewable on appeal despite the absence of an objection to some of them below.

We consider first a statement that gives us little reason for pause--". . . ask yourself why didn't he blow [into the breathalyzer]? This is what my dad used to say to me: Empty your pockets. Why didn't he blow? Because he knew he was under the influence." We do not agree with Precht's assertion that this comment was an impermissible attempt to shift the burden of proof to Precht. It is not improper for a prosecutor to suggest that a defendant's refusal to take a

sobriety test indicates awareness of intoxication. This is analogous to using evidence that a defendant evaded authorities in order to show the defendant's consciousness of guilt. *See State v. Hargraves*, 62 Idaho 8, 19-20, 107 P.2d 854, 858 (1940) (evidence of defendant's flight from authorities admissible to show guilty conscience); *State v. Friedley*, 122 Idaho 321, 322-23, 834 P.2d 323, 324-25 (Ct. App. 1992) (evidence of defendant's failure to appear for arraignment and previous trial admissible to show consciousness of guilt). This component of the closing argument was not improper.

Other comments by the prosecutor are more troublesome, however. They involve a theme adopted by the prosecutor that entailed repeatedly using the term "Prove it." One such statement challenged on appeal is: "You heard him on the tape. Are you going to take my [sobriety] test, Mr. Precht? He says, blow it out your ass. Prove it." Considered in isolation, it is not clear that this "prove it" was meant to impermissibly shift the burden of proof; it could have instead been indicating that Precht challenged the officer to prove that Precht was under the influence of alcohol when Precht refused the sobriety test. However, when considered in context with *all* of the prosecutor's uses of the phrase "prove it" during trial, the meaning conveyed by this challenged statement is more problematic. The prosecutor began his theme during opening statement when he said:

> Oh yeah, [Precht] admits he was going to be drinking. You'll hear all this. You're going to see the beers. You're going to hear about his driving pattern. *So the officer says, you know what, let me perform some tests on you. Prove it.* Nope. Not nice. Nope. Well, you're under arrest. The officer arrests him for suspicion of DUI.

This statement can be interpreted to mean that the officer gave Precht an opportunity to prove his innocence by taking field sobriety tests. During cross-examination of Precht, the prosecutor carried forward this implication that Precht could have proved his non-intoxication by taking a breath test:

> Q: Now, you seem like you're a pretty--pretty smart guy, Mr. Precht. I've got a question for you. You go down to the station and we can end all this discrepancy, right?
>
> A: Yep.
>
> Q: How can we do that?
>
> A: Well, in retrospect I could have taken your little test, but I was mad as hell.
>
> Q: Okay.

A: And I'm still mad as hell.

Q: So we could have ended all this discrepancy if you'd have just--'cause they can't railroad you on a machine, right?

A: Oh, you never know. Those machines have been known to be wrong.

Q: But you could have blew [sic] and you didn't.

A: They--well, I asked to see the certification of recent calibration.

. . . .

Q: And . . . he asked you to take the test to prove--essentially prove it. End all of this, right?

Again, the prosecutor used the phrase "prove it" to convey that Precht had an opportunity to prove his innocence. The prosecutor used "prove it" one more time at the beginning of closing argument, where he explained his theme:

> My closing argument is going to be predicated on something I call, it's simple, prove it. . . . . It's called prove it, it's the way I see some things. . . .
>
> Again, I want to talk about a couple different things I like to call prove it . . . .

The prosecutor then went on to analogize the presentation of evidence to playing poker, and suggested that Precht did not show his "card." The prosecutor said:

> Now, what do we have? We've got certain things--*certain pieces of evidence he's given us, so to speak*. Cards--you know, we have to deal with the cards we've been dealt basically. And I like to draw an analogy to that of this phenomenon that's sweeping America right now, this poker game called Texas Hold 'em. I don't know--and I'm not a card player. But the gist of it is five cards are turned up, this is what you have, and the player gets to keep one card down and never show it.
>
> So what do we have, you guys, that we get to see in this game, *that we've seen from him*?

Precht objected that this was an attempt to shift the burden of proof, and the district court, without overruling or sustaining the objection, instructed the prosecutor to change the language of his argument.

Collectively, the foregoing statements by the prosecutor could be interpreted to convey that the jury should hold Precht accountable for failing to prove his innocence. While never explicitly stating that Precht had the burden of proof, the prosecutor used language that could have been calculated to lead jurors to that impression. We therefore conclude that Precht has shown prosecutorial misconduct.

Precht also argues that the prosecutor engaged in misconduct by placing before the jury in closing argument an alleged fact not in evidence--that one of the officers who testified against Precht had received some "highest level" recognition from the governor. Precht objected immediately, and his objection was sustained, though no curative instruction was requested or given. This effort by the prosecutor to introduce to the jury facts not in evidence was clearly improper and the district court correctly sustained the objection. *See State v. Tupis*, 112 Idaho 767, 771, 735 P.2d 1078, 1082 (Ct. App. 1987); *State v. Campbell*, 104 Idaho 705, 717-18, 662 P.2d 1149, 1161-62 (Ct. App. 1983).

Precht's final complaint of prosecutorial misconduct stems from a rhetorical question asked by the prosecutor in oral argument, "Who should be mad? . . . Who should be mad?" It occurred as follows:

> You heard [Precht] say he was mad. He's still mad. Do we care? Let him know--you drink and drive under the influence in Canyon County, the state of Idaho, we don't care if you're mad. Let him know that. These officers are not on trial. The citizens of this county don't care if he's mad. He sat right there in front of all of us and he said how he chug-a-lugged a beer in a parking lot. Who should be mad? And then he drove. Who should be mad? I'm going to ask that you find him guilty.

Precht did not object to this line of argument but contends on appeal that it is fundamental error as a prosecutorial appeal to the jury's passion or prejudice. He relies upon *State v. Phillips*, 144 Idaho 82, 87, 156 P.3d 583, 588 (Ct. App. 2007), where we held that a prosecutor's repeated suggestions that jurors should feel irritated and upset by certain testimony favoring the defendant were appeals to emotion, passion or prejudice and constituted misconduct. However, Precht did not raise this issue in his intermediate appeal from the magistrate division to the district court. Nowhere in that appeal did Precht refer to the prosecutor's "Who should be mad?" comments as a component of his claim of prosecutorial misconduct. Issues that were not raised in an intermediate appeal may not be asserted in this Court. *State v. Donohoe*, 126 Idaho 989, 992, 895 P.2d 590, 593 (Ct. App. 1995); *State v. Bailey*, 117 Idaho 941, 943, 792 P.2d 966, 968 (Ct. App. 1990). Therefore we will not address this portion of the prosecutor's closing argument in considering Precht's claims of error.

We thus must consider two episodes of misconduct during closing argument--the prosecutor's reference to some gubernatorial recognition of the police officer and the prosecutor's "prove it" theme with its analogy to a poker game. We conclude that even when

considered collectively, these errors by the prosecutor do not require reversal of Precht's conviction. The officer's statement about the governor's recognition was interrupted by a defense objection before he even completed the sentence and therefore conveyed little or no real information to the jury. The prosecutor's statements that could be interpreted as an effort to shift the burden of proof were extremely subtle and indirect and, frankly, at times almost incoherent. The jury was correctly instructed that the State bore the burden of proving each element of the charged offense beyond a reasonable doubt. Under these circumstances, we are persuaded beyond a reasonable doubt that the jury's verdict would have been the same had the prosecutorial misconduct not occurred. Therefore, the prosecutorial misconduct was harmless error.

III.

CONCLUSION

The district court did not err in admitting a videotape of Precht's vulgar insults to the arresting officer. Prosecutorial misconduct occurred during closing argument but was harmless error. Therefore, Precht's judgment of conviction is affirmed.

Chief Judge GUTIERREZ **CONCURS.**

Judge Pro Tem SCHWARTZMAN **CONCURS IN THE RESULT.**